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No. 07-73

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In The

Supreme Court of the United States

ISAAC DAYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I.

In its brief in opposition to Dayan's petition for a writ of certiorari ("Br. Opp."), the government asks the Court to deny the petition based on what it claims is the "interlocutory posture" of the case as a result of the Second Circuit's vacatur of the restitution order and remand to the district court. Br. Opp. 10-11. The government does not cite a single criminal case in support of is argument, and for good reason. Dayan is not seeking interlocutory review of the judgment of conviction. On the contrary, his conviction is final, and nothing the district court does on remand in regard to restitution will affect Dayan's conviction. *See United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (Court of Appeals mandate directing district court to "reconsider sentencing" and "restitution" issues cannot "reasonably be construed to authorize consideration by the district judge of issues relating to the underlying merits of the conviction").

If the government's argument were to be accepted, no judgment of conviction would ever be final since the federal restitution statute authorizes the district court to amend a restitution order whenever additional losses are discovered. *See* 18 U.S.C. §3664(d)(5); *United States v. Cheal*, 389 F.3d 35 (1st Cir. 2004) (restitution order issued 127 days after sentencing was not jurisdictionally barred).

Requiring finality of a restitution order before the Court will review the underlying conviction would also lead to anomalous results. For example, a defendant is required to file a notice of appeal from the judgment of conviction within 10 days of the entry of the judgment, Rule 4(b)(1)(A), F.R.A.P. Yet, the district court is authorized to defer issuing

an order of restitution for up to 90 days after sentencing. 18 U.S.C. §3664(d).[1] As a result, the judgment of conviction, including any term of confinement, and restitution are on different tracks, and waiting for restitution to catch up with the conviction would often result in lengthy confinement, possibly lasting years, before the Court could consider the merits of the underlying conviction.

Nothing in the statute requires such a different result. 28 U.S.C. §1254(1) (the Court may review decisions of the courts of appeals by writ of certiorari "granted upon the petition of any party to any . . . criminal case, before or after rendition of judgment"). In other words, the "interlocutory" doctrine is purely discretionary. Where, as here, any open restitution issue is completely collateral to the merits of the judgment of conviction, the Court can and should grant review now.

Finally, Dayan has incurred the usual expenses associated with retaining counsel to pursue a petition for a writ of certiorari, including legal fees and disbursements. It would be unfair and wasteful to require him to petition again on the same issues after the district court finally resolves the unrelated and collateral issue of restitution. The opposite is true. Review of the judgment of conviction now may obviate or affect restitution, while the district court's resolution of the open restitution issue will never affect the judgment of conviction.

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1. In fact, restitution orders have been issued long after the 90-day period has expired. *See, e.g., United States v. Dando*, 287 F.3d 1007 (10th Cir. 2002) (restitution order issued 176 after sentencing).

II.

The government concedes that where, as here, an indictment specifies "the particular facts that constitute an element of the offense," the government cannot "prove[] different facts at trial to establish that element" without violating the Fifth Amendment's Grand Jury Clause. Br. Opp. 12. The government also concedes that the circuits are divided on the question whether a "to wit" clause in the indictment limits the government's ability to prove guilt on some other basis. Br. Opp. 16-17. Thus, the government concedes the most fundamental basis for review by the Court, i.e., a division among the circuits. U.S. Sup. Ct. Rule 10(a).

Instead, the government is reduced to speculating that the a rational jury could only have convicted Dayan on the basis alleged in the indictment, i.e., allegedly false sales figures for Dayan's company. Of course the government's argument ignores the jury's question which brings the issue into sharp relief:

> Question on counts 3 and 4: Does the definition of "attempt to defraud" include other information on the loan application besides the sales figures, or is the charge based only on the sales figures?

The jury's question can only be understood to reflect the jury's belief that the evidence supported a finding that the subject loan application contained other material, but uncharged, misstatements. The government does not attempt to offer an alternative explanation for the jury's question.

In short, this case squarely presents an important constitutional question concerning the scope of protection provided by the Grand Jury Clause, a question on which the circuits are admittedly confused and divided.

III.

The government claims that the "entire" petition is devoted to the question whether there was any constitutional error, and that petitioner "does not address whether any error that occurred would be amenable to harmless-error analysis." Br. Opp. 18. The government argues that any constitutional error in this case should be deemed harmless and the petition denied on that basis. The government is mistaken on both scores.

The petition's question presented raises the very issue the government claims petitioner ignored, i.e., "Isn't it a violation of the Fifth Amendment's Grand Jury Clause, *requiring reversal*, to permit a jury to convict . . . on a theory of falsity different from the particular one alleged in the indictment. Pet. I (emphasis added). Moreover, in the first paragraph of the section devoted to the reasons for granting the writ, the petition points out that *Stirone v. United States*, 361 U.S. 212 (1960), is understood as the origin of the doctrine of constructive amendment, "which Stirone held to be *per se* reversible error." Pet. 6. Finally, petitioner pointed out that, under constructive amendment jurisprudence, the critical distinction articulated by the courts between constructive amendment and variance is that the former is *per se* reversible error while the latter requires a showing of prejudice. *Id.* Thus, the government fails to appreciate that the petition raises two intertwined and important questions, i.e., what constitutes a constructive amendment within the meaning of the Grand Jury Clause and

Stirone, and whether a constructive amendment can ever be harmless.

The government's contention a violation of the Grand Jury Clause is subject to harmless error analysis has also been repeatedly and recently rejected by every circuit court of appeals, each of which has held since *Chapman v. California*, 386 U.S. 18, 22 (1967), that a constructive amendment is *per se* reversible error and can never be harmless. *See, e.g., United States v. McKee*, ___F.3d.___, 2007 WL 3132417 (3d Cir. Oct. 29, 2007) ("We have held that a constructive amendment is an exceptional category of error because it violates a basic right of criminal defendants, the grand jury guarantee of the Fifth Amendment . . . Thus, where a trial court constructively amends a jury instruction [sic], our plain error analysis presumes prejudice"); *United States v. Whirlwind Soldier*, 499 F.3d 862, 870 (8th Cir. 2007) ("a constructive amendment of an indictment is reversible error per se"); *United States v. Budd*, 496 F.3d 517, 521 (6th Cir. 2007) ("Both actual and constructive amendments are considered per se prejudicial and are reversible error"); *United States v. Tampas*, 493 F.3d 1291, 1301 (11th Cir. 2007) ("If he is correct [that the indictment was constructively amended], this is reversible error per se because it violates his Fifth Amendment right to be tried on the charges presented by the grand jury"); *United States v. Ratliff-White*, 493 F.3d 812, 821 (7th Cir. 2007) ("While there exists only a rather shadowy distinction between amendments and variances, a finding of one rather than the other achieves a crystal clear difference in result: amendments have been held to be prejudicial per se, while variances may be subject to the harmless error rule"); *United States v. Hernandez*, 490 F.3d 81, 83 (1st Cir. 2007) ("A constructive amendment is considered prejudicial per se and grounds for reversal of a conviction"); *United States v. Sells*,

477 F.3d 1226, 1237 (10th Cir. 2007) ("constructive amendment . . . is reversible per se"); *United States v. Baugham*, 449 F.3d 167, 176 (D.C. Cir. 2006) ("the more acute divergences (labeled 'constructive amendments') . . . lead to reversal automatically, without a specific inquiry as to harm"); *United States v. Bhagat*, 436 F.3d 1140, 1145 (9th Cir. 2006) ("A constructive amendment mandates *per se* reversal"); *United States v. Milstein*, 401 F.3d 53, 65 (2d Cir. 2005) (reversing conviction on constructive amendment grounds; "[c]onstructive amendment is a *per se* violation of the Fifth Amendment"); *United States v. Nunez*, 180 F.3d 227, 230-231 (5th Cir. 1999) ("a constructive amendment of the indictment is a reversible error per se if there has been a modification at trial of the elements of the crime charged"); *United States v. Floresca*, 38 F.3d 706, 712-14 (4th Cir. 1994) ("under *Stirone*, constructive amendments of a federal indictment are error *per se*, and, under *Olano*, must be corrected on appeal even when not preserved by objection").

Aside from the fact that *Stirone* characterized a constructive amendment "as far too serious to be treated as nothing more than a variance and then dismissed as harmless error," 361 U.S. at 217, the reason for the unanimity among the circuits on the issue of relief seems obvious. Trying a defendant on a charge not found by the grand jury effectively converts an indictment into a charge brought by a prosecutor, precisely the evil against which the Grand Jury Clause was designed to protect. Like the Sixth Amendment right to counsel, the Grand Jury Clause is the epitome of a structural error, and requires reversal even when the error is not preserved. *See Midland Asphalt Corporation v. United States*, 489 U.S. 794, 802 (1989) (Scalia, J.) (interlocutory appeal permitted where defect is so fundamental that it "causes . . . the indictment no longer to be an indictment"). *Id.* at 802.

In the face of the foregoing unbroken and compelling authority, the government's remarkable contention that *Stirone* has been overruled by the Court *sub silentio*, Opp. Br. 17-18, would alone be grounds for granting the petition.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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